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52249—34

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR, petitioner

v.

VIRGINIA-COLORADO DEVELOPMENT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Secretary of the Interior, prays that a writ of certiorari issue to review the decree of the Court of Appeals of the District of Columbia entered in the above-entitled cause on January 22, 1934. (R. 14.)

OPINIONS BELOW

No opinion was written by the Supreme Court of the District of Columbia. (R. 7.) The opinion of the Court of Appeals (R. 11–14) is reported at 69 F. (2d) 123.

JURISDICTION

The judgment of the Court of Appeals was entered January 22, 1934. (R. 14.) The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does Section 37 of the Act of February 25, 1920, c. 85, 41 Stat. 437, 451, give to the Secretary of the Interior power, upon hearing, to cancel claims to oil shale lands initiated under the Mining Act of 1872, 17 Stat. 91, 92, being Section 2324 of the Revised Statutes, where the locator has neglected to perform assessment labor of the value of $100 or more during any assessment year, provided action to cancel such claim shall have been taken by the Secretary of the Interior before the owner of the claim resumes assessment work?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

This is a suit in equity brought in the Supreme Court of the District of Columbia by the Virginia-Colorado Development Corporation, as plaintiff, against the Secretary of the Interior as defendant, in which a mandatory injunction was sought requiring the Secretary of the Interior to vacate and set aside his decision declaring certain oil shale placer claims, owned by plaintiff, to be null and void, and to vacate the proceedings upon which he based such decision. The essential facts alleged in the bill of complaint are as follows:

In June, 1917, under the Mining Act of 1872, the plaintiff located certain oil shale placer claims in Colorado known as the Mt. Mamm, Nos. 12 to 17. (R. 1.) That Act (*infra* p. 12) required that until a patent was issued for the claims "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

The plaintiff from the time of the location of the claims up to and including the year ending July 31, 1930, performed the assessment work of not less than $100 annually as required by the statute, but failed to perform such labor during the year ending July 31, 1931. (R. 2.) This default continued throughout the months of July, August, and part of September, 1931 (R. 2), but the plaintiff intended to resume work upon the claims and would have done so had not the Secretary of the Interior taken the action complained of in this case. (R. 2.) Plaintiff had no intention of abandoning its claims. (R. 2.)

On September 4, 1931, proceedings were initiated by the Department of the Interior, through the General Land Office, against plaintiff's claims, by

the filing in the Land Office and posting on the claims of a challenge to the plaintiff's right and title thereto. (R. 2.) This challenge was based upon the ground that the plaintiff had failed to perform the assessment labor for the year ending July 31, 1931, and had not resumed such labor before the challenge was filed and posted. The challenge stated that the United States resumed possession of the land within the claims. (R. 2.) It was based upon the ground that the plaintiff's failure to perform assessment work for the year ending July 31, 1931, and before the filing of the challenge on September 4, 1931, entitled the Secretary to declare a forfeiture of the plaintiff's right and title to the claims and made them subject to cancellation by the Government. (R. 2.) No relocation of the claims had been made or attempted by any other person or company during this period, nor had anyone made application to lease the lands from the Government. (R. 2–3.)

The plaintiff contested the proceedings in the General Land Office, but the Commissioner held that the plaintiff's claims were null and void, and upon appeal this decision was affirmed by the Secretary of the Interior. (R. 3.) On July 15, 1932, the Department's decision was promulgated declaring the plaintiff's claims to be null and void, and asserting that the United States had taken possession of the lands within the claims for its own uses and purposes. (R. 3.)

The plaintiff contended that these proceedings were unauthorized, and that its claims were good

against the United States, notwithstanding its failure to perform assessment work. (R. 3–5.) The prayer was for a mandatory injunction to set aside the proceedings and decision. (R. 6.)

The defendant moved to dismiss the bill. (R. 7.) The motion was denied, the defendant declined to plead further, and a decree was entered as prayed in the bill. (R. 7–8.) This decree was affirmed by the Court of Appeals. (R. 14.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Appeals erred in holding that under Section 37 of the Mineral Leasing Act of 1920 the Secretary of the Interior was without authority to declare a forfeiture of the claims in question.

2. The Court of Appeals erred in holding that the action of the Secretary of the Interior in his challenge of the plaintiff's claims and his resumption thereof for the United States were without authority of law and were null and void.

3. The Court of Appeals erred in affirming the decree of the Supreme Court of the District of Columbia.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals of the District of Columbia has decided a question of substance relating to the construction of the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, *infra*, p. 11, which has not been, but should be, settled by this Court. The question is as to the effect, under Sec-

tion 37 of that Act, of a locator's failure to maintain a claim under the Mining Act of 1872, c. 152, 17 Stat. 91, 92, R.S. Sec. 2324, *infra*, p. 12, by annual assessment work, and whether, on such failure, the Government has any right to challenge the location. This question is not settled by *Wilbur* v. *Krushnic*, 280 U.S. 306, but was expressly saved by the following language in the opinion in that case (pp. 317–318):

> It is not doubted that a claim initiated under § 2324, R.S., could be maintained by the performance of annual assessment work of the value of $100; and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, *unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened;* * * * (Italics ours.)

2. The question presented is of general importance. Many tracts of land of the character now subject to the Act of 1920, but which were embraced in locations under the Act of 1872, existing at the time of the passage of the later Act, now lie inactive through the failure of the locators to perform any assessment work or undertake any development thereof. Under the decision of the Court of Appeals such tracts cannot be leased under the Act of 1920, for the old locator may at any time reassert his claim by renewal of assessment work, and title to these tracts may, therefore, re-

main clouded indefinitely (barring provable abandonment).

3. The decision of the Court of Appeals is believed to be erroneous.

The Act of 1920 (Sec. 37) protects existing claims provided that they are "maintained in compliance with the laws under which initiated."

Claims may be so maintained by the continuous application of the annual assessment work required by the Act of 1872 or, failing that, by resumption after default and before any challenge by the Government. *Wilbur* v. *Krushnic*, 280 U.S. 306.

Here there was no maintenance in either of those ways: The assessment work was in default, and before its resumption the Government challenged the location. The court below, however, held that the claims cannot be challenged on this ground.

Before the Act of 1920, the holder of a location under the Act of 1872 had an estate subject to a condition subsequent. The condition was that he perform the assessment work required, and the result of failure was that his estate was subject to defeasance in favor of a relocator (Sec. 5, *infra*, p. 12). The Government was interested only, under the then policy, in keeping such lands open for private exploitation. It looked for no revenue directly, did not itself work mines, or lease land for that purpose. It, therefore, was well settled that it had no interest itself in whether the assessment

work was regularly done or not, and when $500 worth of work had been performed a patent could be called for, although in some years work had been omitted. *Wilbur* v. *Krushnic*, 280 U.S. 306, 317. But the estate of the locator was subject to defeasance, whenever work was in default, in favor of a private relocation.

The Act of 1920 indicates a complete new policy as to the lands within its scope. The Government no longer grants its coal and oil lands freely to locators and discoverers, conditioned only on development, but deals with them as resources to be preserved, either to be leased and revenue derived, or to be withheld from leasing altogether, in the public interest. *United States* v. *Wilbur*, 283 U.S. 414. As to such lands, the United States asserts its title, and for the first time becomes interested in the performance or non-performance by existing locators of the condition subsequent on which its prior grants were made.

By the same Act location (and therefore relocation) of oil and coal lands is abolished. Estates of existing locators are no longer subject to defeasance in favor of private relocators, because there can no longer be location or relocation of such claims. Accordingly, existing claims, if also free from challenge by the Government, are free of the condition subsequent upon which they were originally granted. Estates subject to a condition subsequent, and to defeasance for breach of the condi-

tion, in favor of any private relocator, have become perfected whether the condition is performed or not.

This cannot be the meaning of the Act of 1920. That Act provided, justly, for the protection of old claims, but only while they were "maintained in compliance with the laws under which initiated." If not "maintained" as stated, they must be subject to defeasance, as before. But the defeasance cannot operate exactly as before, because private relocation is no longer possible. Defeasance, therefore, must be at the challenge of the Government, which not only holds the ultimate title, but itself made the grant and imposed the condition of assessment work, and has now announced a policy giving it an interest in the observance of that condition. If the Government cannot now take advantage of the breach of the condition of assessment work, then no one can. Permitting it to do so, upon due notice and hearing in the Land Office (as was attempted here), conforms to the policy of both the Acts, and brings them into harmony. Denying such authority (as the courts below have done) is out of harmony with the policy of both the Acts:—with that of 1872 because it granted rights on a condition subsequent, which no longer exists in its original form and which under the decision below no longer exists at all; and with the Act of 1920 because it continued rights to claims while "maintained" under the old

laws, but which under the decision below cannot be challenged for failure to maintain them. Both Acts contemplate that oil and coal lands may be developed by some one, either the original locators, re-locators, or lessees. Under the decision below, if the original locators fail to move, it is impossible to clear the title (failing provable abandonment), and development by anybody else cannot occur.

It is quite clear that Congress did not intend, by the Act of 1920, to suspend the obligation to perform assessment work. It directly said that such claims must be "maintained"; and when Congress has intended a suspension, it has authorized it directly, for temporary periods. Pub. Res. No. 20, approved November 13, 1919, c. 106, 41 Stat. 354; Act of December 31, 1920, c. 8, 41 Stat. 1084. The practical effect of the decision below is a permanent suspension of the obligation, as to all coal and oil lands on which valid locations were outstanding on February 25, 1920. It is believed this is erroneous, and its result is to delay indefinitely the resumption by the Government of its title to these lands, and their development by anybody else.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

APRIL, 1934.

APPENDIX

The Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437 (U.S.C., Title 30, Secs. 181, 193):

SEC. 1. That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, * * *.

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming", approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, *except as to valid claims existent at date of the passage*

of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery. (Italics ours.)

Section 2324, Revised Statutes (Mining Act of May 10, 1872, c. 152, Sec. 5, 17 Stat. 91, 92):

> * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. * * * (U.S.C., Title 30, sec. 28.)